IN THE

# Supreme Court of the United States

OCTOBER TERM, 1975

**No. 75-552**

THOMAS S. KLEPPE, *Secretary of the Interior,* et al.,
*Appellants,*

vs.

SIERRA CLUB, et al.,
*Appellees.*

**No. 75-561**

AMERICAN ELECTRIC POWER SYSTEM, et al.,
*Appellants,*

vs.

SIERRA CLUB, et al.,
*Appellees.*

**On Appeal from the United States Court of Appeals for the District of Columbia Circuit**

## MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE AND BRIEF OF AMICUS CURIAE IN SUPPORT OF APPELLANTS ON BEHALF OF PACIFIC LEGAL FOUNDATION

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## Subject Index

## Table of Authorities Cited

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## MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE IN SUPPORT OF APPELLANTS ON BEHALF OF PACIFIC LEGAL FOUNDATION

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This motion of the Pacific Legal Foundation for leave to file the annexed brief *amicus curiae* is re-

spectfully made pursuant to Rule 42, consent to the filing of a brief having been granted by counsel for eleven of the appellants, while five of the appellants and the appellees have not responded, and therefore consent is deemed denied. All responses have been lodged with the Court.

Pacific Legal Foundation is a nonprofit, tax-exempt corporation organized and existing under the laws of California for the purpose of engaging in litigation in matters affecting the public interest. Policy for the Pacific Legal Foundation is set by a Board of Trustees composed of concerned citizens. Ten of the seventeen-member Board are attorneys. The Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community.

The Pacific Legal Foundation believes the action of the court below in enjoining coal leasing in the Northern Great Plains until a regional environmental impact statement is prepared or a negative declaration is filed will seriously and adversely affect the general welfare of the people of this nation. This ruling is squarely in conflict with that of this Court in *Aberdeen & Rockfish R. Co. v. SCRAP,* 422 U.S. 289 (1975), and with a number of federal circuit court decisions.

Pacific Legal Foundation considers this case extremely significant and believes that serious consequences will occur if this overly broad decision is not reversed. First, the lower court's decision requires the



preparation of environmental impact statements at the regional level which is a redundant exercise that is not required by the National Environmental Policy Act. Second, as a practical matter, the decision causes further needless delays in the development of critically needed low sulfur coal reserves of the Northern Great Plains.

Pacific Legal Foundation believes that the magnitude of this issue must be fully developed, and to aid this development requests that this motion to file the annexed brief *amicus curiae* be granted.

Respectfully submitted,

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## BRIEF OF AMICUS CURIAE IN SUPPORT OF APPELLANTS ON BEHALF OF PACIFIC LEGAL FOUNDATION

## INTEREST OF AMICUS

The interest of *amicus* is set out in the preceding motion to file this brief.

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## OPINION BELOW

The United States Court of Appeals, District of Columbia, in an opinion reported at 514 F.2d 856 (D.C. Cir. 1975), declared that the National Environmental Policy Act required the preparation of either a regional environmental impact statement for the Northern Great Plains or the preparation of a negative declaration since the government's role in the development of coal in that region had attained the posture of a "contemplated" program. The court enjoined further leasing of federal lands for mining coal until compliance with its order.

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## INTRODUCTION

The central question is whether the National Environmental Policy Act[1] (hereinafter NEPA) mandates the preparation of a program environmental impact statement (hereinafter EIS) for a region even though no proposal for federal action exists for that region.

To dictate to federal decision makers the contents, scope and geographical areas that should be covered by planning programs and EIS's strips them of their

[1] 42 U.S.C. § 4321, *et seq.* (1970).



authority and arbitrarily imposes comprehensive planning obligations when no federal action is proposed. This is contrary to NEPA and the decision of this Court in *Aberdeen & Rockfish R. Co. v. SCRAP*, 422 U.S. 289 (1975) (hereinafter *SCRAP II*), but more it would squander limited resources on speculative endeavors and, in the opinion of dissenting Judge MacKinnon, paralyze the federal government.

The broader question, in light of the manner in which NEPA has been judicially interpreted, is whether NEPA's purpose is being lost in a blizzard of paper work and litigation with resulting costly stoppage and delays in essential programs.

NEPA was enacted for the purpose of facilitating agency decision making and not for the purpose of paralyzing the federal government. Unless it is rationally applied there will be disproportionate and unproductive expenditures of resources on planning rather than actual performance. To impose another useless layer of statements, such as the presently considered regional EIS's, will result in such unproductive expenditure and needless costly delay.

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## ARGUMENT

### I

### NEPA MUST BE REASONABLY CONSTRUED AND APPLIED OR ITS PURPOSE WILL BE FRUSTRATED

NEPA declares that it is the "policy of the Federal Government . . . to use all practicable means and measures . . . in a manner calculated to foster and

promote the general welfare, to create and maintain conditions under which man and nature can exist in *productive harmony,* and *fulfill the social, economic,* and other *requirements of present and future generations* of Americans." 42 U.S.C. § 4331(a) (emphasis added).

To achieve this purpose, NEPA mandates the consideration of environmental factors in decision making "along with economic and technical considerations." 42 U.S.C. § 4332(2)(B).

The keystone of the law is a balancing of all relevant factors so that a reasoned decision will be reached. Indeed, a rule of reason must prevail for as was so well stated in *Maryland-National Capital Planning Commission v. Schultz,* Civil No. 255-72 (D.D.C. May 11, 1973):

> "NEPA 'must be construed in the light of reason if it is not to demand what is, fairly speaking, not meaningfully possible, given the obvious, that the resources of energy and research—and time—available to meet the Nation's needs are not infinite.' *NRDC v. Morton, supra,* 837. Otherwise the statute, which was intended to ensure the consideration of environmental consequences in the performance of government activities will become perverted into a convenient roadblock to throw in the path of any—even worthwhile—project with which a citizen disagrees."

To require a regional environmental statement where no program exists is totally unreasonable. The preparation of such theoretical documents would squander limited resources and paralyze government.



An infinite number of geographic or generic interrelationships can be found among the various federal projects throughout the country, and different litigants might seek to incorporate the same project into a myriad of different programs for planning purposes. In addition, the use of NEPA to impose a comprehensive planning duty on an unwilling agency as a means of forcing preparation of a comprehensive impact statement would intrude unduly on agency discretion and involve the courts to an unacceptable extent in the day-to-day business of running the government.

Or, as was stated by Judge MacKinnon in his dissent in this case, imposition of such a comprehensive planning obligation *would paralyze the federal government,*[2] and Congress, in passing NEPA, clearly did *not* have such a requirement in mind.

In addition, such a requirement is redundant. It must be emphasized that the Department of the Interior recognizes its environmental responsibilities. It has undertaken a national coal leasing program which includes the Northern Great Plains (hereinafter NGP) Region as defined by the respondents.[3] On September 19, 1975, the Department issued a Final Environmental Impact Statement on this program. Respondents should look to this comprehensive document for treatment of the NGP and if they feel the

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[2] *Sierra Club v. Morton,* 514 F.2d 856, 892 (D.C. Cir. 1975).

[3] United States Department of the Interior: News Release, *New Federal Coal Leasing Policy To Be Implemented Under Controlled Conditions,* January 26, 1976.

"area" has not been adequately assessed, they may judicially question the adequacy of the national programmatic EIS.

The Department also has and shall issue specific EIS's on individual leases or mining plans before approving such.[4] The specific site or mining plan EIS may be evaluated and challenged if its scope does not incorporate relevant cumulative development.

In addition, the Department has and will prepare impact statements for areas of intermediate size assessing coal development and cumulative environmental impact of related developments in that area, the definitional criteria being basin boundaries, drainage areas, areas of common reclamation problems, administrative boundaries, areas of economic interdependence, and other relevant factors.[5]

Obviously, the Department is better equipped to evaluate these criteria and to make a reasoned, analytical determination of when a separate EIS is needed for an area of intermediate size. Such is an administrative function which must be left to the expertise of trained decision makers.

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[4]United States Department of the Interior, *Final Environmental Impact Statement: Proposed Federal Coal Leasing Program* at 1-4 (September 19, 1975); *Sierra Club v. Morton, supra* n.2 at 885.

[5]*Final Environmental Impact Statement: Proposed Federal Coal Leasing Program, supra* n.4 at 1-4.



## II

### NEPA DOES NOT COMPEL THE GOVERNMENT TO DEVELOP A REGIONAL EIS WHEN IT HAS NO PROGRAM FOR THE REGION

Section 102(2)(c) of NEPA (42 U.S.C. § 4332(2)(C)) requires an EIS for every "recommendation or report on proposals for legislation and other major federal actions significantly affecting the quality of the human environment."

In *Aberdeen & Rockfish R. Co. v. SCRAP, supra* at 322, this Court held:

> "In order to decide what kind of an environmental impact statement need be prepared, it is necessary first to describe accurately the 'federal action' being taken."

It thus logically follows that if no federal action of regional scope is being taken no EIS is required. Such is the case here.

The circuit court did not disturb the district court's findings that there was *no* existing federal program or proposal calling for regional development. Regardless, the circuit court held that certain facts indicated the government "contemplated" regional development requiring an EIS. The EIS was compelled because such "*must precede*" the "recommendation or report on *proposals* for . . . major federal actions." *Sierra Club v. Morton,* 514 F.2d 856, 879 (D.C. Cir. 1975).

This is not the holding of this Court in *SCRAP II* for this Court stated:

> "NEPA provides that such statement . . . shall accompany the *proposal* through the existing agency review processes."

> "[T]he time at which the agency must prepare the final statement is the time at which it makes a recommendation or report on a *proposal* for federal action." *SCRAP II, supra* at 215.

The Department has not "proposed" "major federal actions" which require the preparation of an EIS covering all coal related development in the Northern Great Plains Region. Private lease applications are being considered by the Department, but they do not constitute a regional proposal. Neither does the Northern Great Plains Resources Program. This research study was initiated by past Interior Secretary Morton to assess potential social, economic and environmental impacts that development of the NGP Province would cause.[6] The study's purpose was quite similar to the Southwest Energy Study, discussed in *Jicarilla Apache Tribe of Indians v. Morton,* 471 F.2d 1275, 1279 (9th Cir. 1973). There the study "was designed to evaluate the problems created by further development of coal fired electric power in the Southwest." The Ninth Circuit ruled that the EIS's of these individual power plants did not require an EIS for the region defined in this study.

There being no regional program—no proposal for federal action—NEPA plainly does not require an EIS.

[6] *Sierra Club v. Morton, supra* n.2 at 863, 889.



## III

### INDIVIDUAL EIS's ON EACH LEASE FULLY SATISFY THE PURPOSES OF NEPA

The Department of the Interior has and shall issue EIS's on individual leases and mining plans before granting approval to proceed with their operation.[7] Each such lease and EIS stands on its own. Each has independent significance and utility. Each satisfies NEPA by fully evaluating the project and its environmental impact.

Because each is a separate viable entity it should be examined on its own merits. It is not a mere component or increment of a regional program and it would be an error to make it an "evidentiary hostage" of a nebulous and undetermined regional program. This is consistent with recent well reasoned decisions in various circuits.

In *Trout Unlimited v. Morton,* 509 F.2d 1276 (9th Cir. 1974), the court was confronted with the two phased Teton Basin Project. The principal facilities planned under Phase I were a dam and reservoir. This phase of the project was to be constructed regardless of whether Phase II was ever determined feasible and consequently implemented. The court, in distinguishing these facts from cases relied on by the proponents of a broader scoped EIS, commented:

> "The appellants contend that the EIS is fatally inadequate because it does not discuss the environmental impact of the Second Phase. They

[7] *See* environmental impact statements prepared for Westmoreland Mine and Peabody Coal Company project.

rely upon cases which hold that a series of interrelated steps constituting an integrated plan must be covered in a single impact statement. [Footnote omitted.] We believe these authorities are inapposite and that the failure of the EIS to discuss the Second Phase does not render it inadequate. The distinction between those situations in which it has been held that the EIS must cover subsequent phases and that before us is that here the First Phase is substantially *independent* of the Second while in those in which the EIS must extend beyond the current project, that project was dependent on subsequent phases. The dependency is such that it would be irrational, or at least unwise, to undertake the first phase if subsequent phases were not also undertaken. [Footnote omitted.] This is not the case here." *Id.* at 1285 (emphasis added).[8]

The analogy to the present case is pure. The development of coal on specific sites in the so-called Northern Great Plains Region is not dependent on subsequent leases and mining plans within the area. The individual leases are independent of NGP's Region and their utility and significance relies on no peripheral coal development or secondary development of the region. Therefore, an EIS on the lease or mining plan, considering local cumulative development, completely satisfies NEPA.

The Tenth Circuit in *Sierra Club v. Stamm,* 507 F.2d 788 (10th Cir. 1974), held the Strawberry Aque-

[8]*See also Environmental Defense Fund, Inc. v. Armstrong,* 487 F.2d 814 (9th Cir. 1973); *Jicarilla Apache Tribe of Indians v. Morton,* 471 F.2d 1275 (9th Cir. 1973).



duct and Collection System to be an "independent" major federal action in spite of the fact that it was one of six planned subunits of the Bonneville Unit, which in turn was one of six units of the Central Utah Project—a water collection, development and diversion plan. The court ruled:

> "Such system can operate and function separately from the remaining unconstructed systems of the Bonneville Unit or other units of the Central Utah Project. . . . [T]he Strawberry Aqueduct and Collection System . . . delineate a reasonable and logical segment . . . for discussion and analysis of the environmental impacts resulting therefrom. . . ." *Id.* at 791.

Thus again the "independent utility" of the unit subjected to judicial scrutiny was determinative of the scope of the applicable EIS.

> "* * * So long as each major federal action is undertaken individually and not as an indivisible, integral part of an integrated state-wide system, then the requirements of NEPA are determined on an individual major federal action basis. . . . [S]uggestion that there is need for a comprehensive study . . . should be made to Congress, and not to the Court." *Id.* at 792.[9]

It is clear that the facts of the case at hand disclose leases and mining plans which are independent of alleged *contemplated* regional development. They can be and should be independently evaluated with separate EIS's for this will best achieve the purpose of NEPA.

[9]*See also Sierra Club v. Callaway,* 499 F.2d 982 (5th Cir. 1974).

Despite this persuasive body of well reasoned decisions, the circuit court held in the case under review that major federal actions can be combined to create a new major federal action for which a separate EIS is necessary.[10] The authorities are *Scientists' Inst. For Pub. Info., Inc. v. Atomic Energy Com'n,* 481 F.2d 1079 (D.C. Cir. 1973) (hereinafter *SIPI*), and *Conservation Soc. of S. Ver., Inc. v. Secretary of Tran.,* 508 F.2d 927 (2d Cir. 1974) (hereinafter *Conservation Society*). These cases require an EIS which covers more than the individual project when an *irretrievable commitment of resources* beyond what was actually expended on the individual project occurs.

In *SIPI,* each development of the Liquid Metal Fast Breeder Reactor Program made future abandonment of the program and the resources invested in favor of an alternate energy strategy less likely. In *Conservation Society,* construction of a 20-mile segment of highway would generate traffic and thus create pressure for further construction along the entire route and foreclose consideration of alternatives to highways. Program EIS's were consequently required, a result with which *amicus* has no objection. But, the distinction of these above potential "regional" developments with that of the instant case is clear. As dissenting Judge MacKinnon observed:

> "*SIPI* and *Conservation Society* found that a federal action at one point in the 'region' would cause a ripple effect which would eventually have an impact on future federal actions elsewhere in

[10] *Sierra Club v. Morton, supra* n.2 at 877-878.



> the 'region'." *Sierra Club v. Morton, supra* at 888.

Thus where the only irretrievable resource commitments are those directly associated with the individual project, an EIS covering that project is adequate to enable the agency to act and necessarily fully satisfies NEPA. *See also Daly v. Volpe,* 514 F.2d 1106 (9th Cir. 1975); *Chelsea Neighborh'd Ass'ns v. United States Post. Serv.,* 516 F.2d 378 (2d Cir. 1975); *Friends of the Earth, Inc. v. Coleman,* 518 F.2d 323 (9th Cir. 1975).

It again is clear that the facts of the case under review describe coal leasing which will not cause a "ripple effect" in the Northern Great Plains. The facts are devoid of any commitment of regional resources which would justify the circuit court's ruling. Therefore, a separate EIS for each lease or mining plan completely satisfies the spirit of NEPA.

The Program Statement and the Site Specific Statements supply extensive and certainly ample information on the environmental ramifications of the "appropriate" proposed federal action to allow informed and reasoned decision making. The goal of NEPA is just this and is not to subject economic progress to the rigors of unnecessary, redundant EIS preparation. The EIS's currently prepared satisfy the spirit of NEPA. If this is disputed, the adequacy of a particular EIS may be challenged, but to require an extra EIS layer which provides no added input and only slows the persistent pace of progress merely

allows disgruntled individuals to temporarily block its certain path at great expense to the general public.

Apart from the sheer nonexistence of substantive authority within NEPA such an approach also is an undue intrusion into agency discretion and inappropriately involves the court in the day-to-day business of government. Deference must be given to administrative decisions[11] and at such a level courts may intervene only if there is a finding that the agency is acting arbitrarily and capriciously.[12] There certainly was no such finding in the case under review. Indeed, in view of the environmental concern shown coal leasing on the local level and national level by the Department of the Interior, such a finding is not possible. Again the Court must deliver the clear message that it is not a judicial function to dictate the future programs in which an executive department must engage. This is an executive decision and must remain separate and distinct.

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[11] *See Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971); *Sierra Club v. Morton*, 510 F.2d 813, 819 (5th Cir. 1975).

[12] 5 U.S.C. § 706(2)(A):

> "To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall——
>
> . . . .
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be——
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . ."



## CONCLUSION

The critical need for development of America's coal reserves is irrefutable. The Department of the Interior recognizes this need but also recognizes that this need cannot run roughshod over the need to protect our environment. The Department has developed a national coal program whereby environmental protection has been extensively considered in its decision making. NEPA has been fully satisfied by the format of preparing a National Programmatic EIS and site specific EIS's. It is obvious that a third EIS layer regarding some region, as selected by private parties through undefined parameters, will provide no increase in environmental protection. The third layer EIS is *not* required by NEPA and will serve only to further retard the development of crucially needed low sulfur coal.

America is nearing an energy crisis but may have no ability to fend it off, should this decision stand. The Pacific Legal Foundation as *amicus curiae* therefore urges the decision of the court of appeals to be reversed and the case to be remanded with instructions to affirm the judgment of the district court.

Respectfully submitted,

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